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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

METZMAIER, DANIEL S

ART UNIT	PAPER NUMBER
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1712

DATE MAILED: 04/09/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application NO.

09/865,296

Applicant(s)

DEDEREN ET AL.

Examiner

Daniel S. Metzmaier

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 January 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4, 7-32 and 34-51 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7-32 and 34-51 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

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DETAILED ACTION

Claims 1-4, 7-32 and 34-51 are pending in the instant application. Claims 1, 7, 15, 19, 20, 21, 28, 29, 35, 36 and 39-41 were amended; Claims 5 and 6 canceled; and new claims 44-51 added by the amendment filed Jan. 27, 2003, Paper No. 7.

Oath/Declaration

1. The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because:

It does not identify the foreign application for patent or inventor's certificate on which priority is claimed pursuant to 37 CFR 1.55, and any foreign application having a filing date before that of the application on which priority is claimed, by specifying the application number, country, day, month and year of its filing.

The declaration improperly identifies the foreign application by the incorrect filing date. The proper date appears to be December 5, 1998 (05.12.98) rather than the December 15, 1998 set forth.

Furthermore, the declaration improperly claims priority for US Application Number 09/452,144, filed 01 December 1999, and US 60/111,440, filed 8 December 1998, under 35 USC 119/365 of any foreign application for patent. Said claim is improper since the US provisional application and the US application filed under 35 USC 111 are not foreign applications for patent. A claim for priority may both be made to said applications under 35 USC 119/365. A proper claim for benefit of the earlier filing date should be made under 35 USC 119(e) for provisional application 60/11,440,

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filed 8 December 1998. A proper claim for benefit of the earlier filing date should be made under 35 USC 120 for application 09/452,144, filed 01 December 1999.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 7, 17-18, 29-30, 39-41 and 46-47 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 7, 8, 39-41 employ open language, "comprising", to further define a species of the claim 1 emulsifiers. It is unclear what is the intended scope of said claims. It is unclear whether these are intended to be further ingredients of the emulsifier, which have been defined in the Markush grouping employing closed language in claim 1, or a narrower definition of the species set forth in claim 1.

Attention is directed to M.P.E.P. § 2173.05(h).

Claims 17 and 18 do not define the temperature of the viscosity measurement.

It is unclear how the sugar set forth in claim 29 differs from the polysaccharides set forth in claim 28. Therefore, the metes and bounds of claim 29 is indefinite because it is unclear whether claim 29 requires a further ingredient, merely more of any of the polysaccharides set forth in claim 28 or a further sugar since claim 28 comprises sugars and a polysaccharide and sugar overlap.

It is unclear if the optional component of claim 30, milling aid, is the sugar of claim 29. Claim 30 is included since it depends on claim 29 and the sugars defined as

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the milling aid has not been defined as the sugars of claim 29. Therefore, it does not correct the indefiniteness of claim 29.

Claims 46-47 are directed to an emulsion of claim 45 but claim 45 is directed to a dry blend of emulsifier/stabilizers.

Claim Objections

4. Claim 51 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 51 is dependent on claim 49 and provides for milk having a specified viscosity whereas claim 51 provides for milks or creams having different viscosities.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1-4, 9, 14, 16, 19, 22, 26-27, 36-37, 39 and 43-44 are rejected under 35 U.S.C. 102(b) as being anticipated by FMC Corp., CA 2,188,331. FMC '331 (examples 5, 6 and 8E) disclose oil-in-water emulsions of fatty lipids dispersed in water. When the claim body defines a structurally complete invention and the preamble only states a purpose or intended use for the invention, the preamble is not a claim limitation; *Kropa v. Robie*, 187 F.2d at 152, 88 USPQ2d at 480-81. Furthermore, the emulsions of FMC

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'331 are disclosed for use in baked goods. Said emulsions are necessarily non-toxic employing emulsified lipids and would have been expected to have use as a personal care or cosmetic composition. Tween 80 is POE(20) sorbitan monooleate, an alkoxylated fatty ester. See page 12, lines 9 et seq, for other nonionic emulsifier.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

9. Claims 28-32 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Modiszewski et al, US 5,498,436. Modiszewski et al (column 6, lines 55-57, and claims) disclose dry particles containing comprising konjac, galactomannan (locust bean gum) and a gelling agent to include xanthan gum. Modiszewski et al discloses 97% passes 100 mesh screen. The 100

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mesh screen corresponds to about 150 microns. Modiszewski et al (claim 14) discloses the gelling agent may comprise 10-90 dry wt % of the composition. Furthermore, the number of gelling agents includes seven species and their combinations and are anticipated for each of the gelling agent species.

To the extent Modiszewski et al differs in the particle size of the dry composition in claims 29 and 30, variation of the particle size of the materials would have been obvious to one having ordinary skill in the art at the time of the invention for the advantages of cost of grinding the materials, material handling the materials to meet safety requirements, and rehydratable properties of the end products.

To the extent Modiszewski et al differs from the claims in that the claimed combination is not exemplified, initially Modiszewski et al claims the instantly claimed combination. Said combination is clearly contemplated therein and is at least suggested to one having ordinary skill in the art at the time of applicants' invention.

To the extent Modiszewski et al differs from the claims in that the claimed milling aid sugars of sucrose, fructose, and glucose; Modiszewski et al discloses the combinations are useful in stabilizing emulsions (column 1, lines 26-30) and making dessert gels and other food products. Sucrose (table sugar), fructose and glucose are common sweeteners in making desserts and would have been a common additive to the gelling compositions. Said combination is clearly contemplated therein and is at least suggested to one having ordinary skill in the art at the time of applicants' invention.

Said claims do not require the wet co-processing of the sugar with the combination of xanthan and glucomannan. It is conventional to combine dry ingredients

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and mix prior to combining the wet ingredients in food preparation. It would have been obvious to one of ordinary skill in the art at the time of applicants' invention to employ sugar with the stabilizers/gelling agents of Modiszewski et al in preparing a dessert composition.

10. Claims 1-4, 7-27, 34-44 and 46-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Imperial Chemical Industries PLC (hereafter ICI), WO 96/31187, in view of FMC Corporation (hereafter FMC), WO 93/02571. ICI (abstract; page 1, last paragraph et seq; examples and claims) discloses surfactant compositions as solid surfactant dispersions optionally comprising an emollient. ICI (page 4 et seq) desirably employs at least one hydrocolloid and emulsified therein at least one emollient oil. ICI (page 5) teaches hydrocolloids including starches, guar, similar polysaccharides and Xanthan gums. ICI (page 6) teaches concentrations which when employed in the milks, lotions and creams, ie., water concentrations of 55 to 95% by weight would read on the instant concentrations. ICI (page 7) further teaches the incorporation of plant extracts. ICI (examples) teaches combinations of nonionic emulsifiers.

ICI differs from the claims in the polysaccharide combination of Xanthan and a polyglucomannan polysaccharide.

FMC discloses cold melt clarified konjac glucomannan. FMC (page 8, lines 13 et seq) teaches the konjac may be mixed with selected hydrocolloids to produce synergistic results having biotechnical applications. FMC further (page 24, lines 21 et

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seq) teaches the konjac has multiple uses including medical technology as drug¹ delivery such as topical anaesthetics, antibiotic, antiseptics and the like. FMC (page 23, line 34 to page 24, line 12) teaches the ratios of konjac to hydrocolloid and give a specific example to Xanthan.

These references are combinable because they teach polysaccharides and their uses. It would have been obvious to one of ordinary skilled in the art at the time of applicants invention to employ a combination of Xanthan and konjac taught in FMC to be synergistic in the compositions of ICI which clearly contemplates numerous different hydrocolloids and the use of desirably at least one hydrocolloid (page 4, lines 11 and page 5, lines 1-6) including Xanthan.

11. Claims 28-29 and 31-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sewell et al., US 5,624,612, in view of FMC Corporation (hereafter FMC), WO 93/02571. Sewell et al (abstract, column 4, lines 3 et seq and column 7, line 54 to column 8, line 14) teaches the formation of rehydratable hydrocolloid microparticulate particles. Said particles preferably employ cold melt konjac and a water soluble hydrocolloid including Xanthan gum among others. Said materials are taught to have a particle size in the range of 0.1 to 150 microns preferably 5 to 30 microns. Sewell et al (column 7, lines 54-60) teaches the microparticulates may be employed to form oil-in-water emulsions and Sewell et al (column 7, line 61 to column 8, line 14; particularly line 6) teaches the optional incorporation of surfactants and detergents among other additives.

¹Contrast with instant claim 23 which includes among other ingredients; antimicrobial components, skin

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FMC discloses cold melt clarified konjac glucomannan. FMC (page 8, lines 13 et seq) teaches the konjac may be mixed with selected hydrocolloids to produce synergistic results having biotechnical applications. FMC further (page 24, lines 21 et seq) teaches the konjac has multiple uses including medical technology as drug² delivery such as topical anaesthetics, antibiotic, antiseptics and the like. FMC (page 23, line 34 to page 24, line 12) teaches the ratios of konjac to hydrocolloid and give a specific example to Xanthan. FMC (page 8, line 35 to page 9, line 1) teaches an advantage of the purified konjac is its increased stability as a dry powder.

These references are combinable because they teach konjac glucomannan, its use and forms. It would have been obvious to one of ordinary skilled in the art at the time of applicants invention to employ the combination of Xanthan and konjac with the optional addition of surfactants and/or detergents in microparticulate form as suggested in the Sewell et al reference for the advantages taught in the FMC reference of synergism.

12. Claims 28-32 and 45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Imperial Chemical Industries PLC (hereafter ICI), WO 96/31187, in view of FMC Corporation (hereafter FMC), WO 93/02571, as applied to claims 1-27 and 33 above, and further in view of Sewell et al., US 5,624,612.

care agents, and skin repair compounds.

²Contrast with instant claim 23 which includes among other ingredients; antimicrobial components, skin care agents, and skin repair compounds.

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ICI in view of FMC teach the combination of Xanthan and polyglucomannan polysaccharide in emulsion form. FMC (page 8, line 35 to page 9, line 1) teaches an advantage of the purified konjac is its increased stability as a dry powder.

ICI in view of FMC differ from claims 28-32 in the formation of the compositions emulsifier system as a rehydratable particulate.

Sewell et al (abstract, column 4, lines 3 et seq and column 7, line 54 to column 8, line 14) teaches the formation of rehydratable hydrocolloid microparticulate particles. Said particles preferably employ cold melt konjac and a water soluble hydrocolloid including Xanthan gum among others. Said materials are taught to have a particle size in the range of 0.1 to 150 microns preferably 5 to 30 microns. Sewell et al (column 7, lines 54-60) teaches the microparticulates may be employed to form oil-in-water emulsions and Sewell et al (column 7, line 61 to column 8, line 14; particularly line 6; and column 16, line 18-27) teaches the optional incorporation of surfactants and detergents among other additives. Said additives would have included conventional nonionic emulsifiers including at least fatty acid esters such as Dimodan® and Triodan® emulsifiers.

These references are combinable because they teach hydrocolloids and their use. It would have been obvious to one of ordinary skilled in the art at the time of applicants invention to employ the hydrocolloid emulsifier microparticulates as taught in the Sewell et al reference with the emulsifiers of the ICI reference for the advantage of a convenient intermediate in forming oil-in-water emulsions having advantageous non-aggregating properties.

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R sponse to Arguments

13. Applicant's arguments filed Jan 27, 2003 have been fully considered but they are not persuasive.

14. Applicants (page 6) assert the issues under 35 USC 112 have been obviated by amendment or are set forth in the specification. Attention is directed to the remaining issues set forth in the above rejections under 35 USC 112 above.

Regarding claims 17 and 18, the parameters of measuring the viscosity should be set forth in the claims to remove ambiguity. This would include temperature and the viscosity measuring device, eg, Brookfield @ 6 rpm.

15. Applicants (page 6) assert the FMC reference are noted to have a plastic consistency and are not in the form of Konjac/xanthan. Applicants further assert the FMC reference does not disclose a milk or cream. Applicant's claims do not set forth limitations to define a cosmetic milk or cream and applicants have not shown the prior art to be distinct based on the limitations of the claims.

16. Applicants (page 6) assert the FMC reference is directed to gels and the claims do not cover gels. The instant claims do not exclude shear thinning compositions, which may take the form of a weak gel. See page 2, lines 9 et seq of the instant specification.

17. Applicants (pages 6 and 7) assert the FMC reference does not disclose use in personal care. Applicants recitation of intended use does not distinguish and otherwise old or otherwise obvious composition. Intended use limitations are given weight only to the extent said limitation impart a structural limitation to the compositions claimed. In

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the instant case, it has not been shown that the compositions of the prior art would be precluded from use as a cosmetic to provide emollient materials to the skin and/or skin barriers.

18. Applicants (pages 6 and 7) assert the combination of FMC and ICI provide no incentive for the combination. This has not been deemed persuasive since the use of a gelling/stabilizer system taught in the art would logically be useful for said advantageous gelling/stabilizer properties in related system. Said reference meets the minimum threshold for analogous art as addressing the issues of stability, gellability and aesthetics.

19. It is unclear where the remaining rejections over Modiszewski et al, US 5,498,436; Sewell et al, US 5,624,612, in view of FMC '571; ICI '187 in view of FMC '571 and Sewell et al, US 5,624,612, have been addressed in the remarks.

Conclusion

20. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any


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extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Daniel S. Metzmaier whose telephone number is (703) 308-0451. The examiner can normally be reached on 9:00 AM to 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert Dawson can be reached on (703) 308-2340. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.


Daniel S. Metzmaier
Primary Examiner
Art Unit 1712

DSM
April 7, 2003